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DISPUTE RESOLUTION
ALERT

IN THIS ISSUE >

Sexual offences epidemic: How is the law assisting?

It is undeniable that South Africa is in the midst of a sexual offences epidemic. The recent national crime statistics reflect that 52,420 sexual offences occurred in 2019 - a 4,6% increase since 2018. Being a survivor of a sexual offence is undoubtedly difficult and, to make matters worse, the inadequacies of our legal system certainly add insult to injury. Should our law not be more proactive than reactive especially concerning crimes of this nature, which to a great extent, affect our women and children?

Who is liable when a payment is made in terms of an invoice that has been intercepted and altered?

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Sexual offences epidemic: How is the law assisting?

On 22 November 2019, a few days before the official start of 16 Days of Activism, a period allocated to raising awareness around violence against women and children, Parliament published the Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Bill.

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On 14 June 2018, the Constitutional Court took a step in the right direction in the case of *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others 2018* ZACC 16. The Constitutional Court found that section 18 of the Criminal Procedure Act 51 of 1977 (Criminal Procedure Act) was inconsistent with the Constitution to the extent that it bars, in all circumstances, the right to prosecute all sexual offences, other than those listed in section 18(f), (h) and (i) of the Criminal Procedure Act, after the lapse of 20 years from the time when the offence was committed.

Section 18 created an arbitrary distinction between sexual offences listed in section 18(f), (h) and (i), being rape or compelled rape, human trafficking and using a child or person who is mentally disabled for pornographic purposes, and those that fell under the common law. The latter and far-broader category of common law offences, including sexual assault, could not be prosecuted 20 years after the offence had been committed.

In the *Levenstein* case, the Constitutional Court afforded Parliament 24 months to enact remedial legislation. And so, on 22 November 2019, a few days before the official start of 16 Days of Activism, a period allocated to raising awareness around violence against women and children, Parliament published the Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Bill (Bill).

The Bill contains three significant proposed amendments to the current statutory framework:

- Section 12 of the Prescription Act 68 of 1969 (Prescription Act) regulates when prescription in civil matters begins to run. Section 12(4) provides that prescription does not commence in respect of a debt based on the commission of, among others, certain statutory sexual offences during the time in which the victim is unable to institute proceedings because of his or her mental or psychological condition. Clause 1 of the Bill aims to amend section 12(4) of the Prescription Act, in order to ensure that all sexual offences, whether they have been committed under common or statutory law, are included in that section. This means that prescription does not commence in respect of claims based on any sexual offence, not only those listed in section 18(f), (h) and (i).
- The Bill further amends the Prescription Act in that it delays the running of prescription in certain circumstances, for example, where the victim is a minor, is "*insane*" or is a person under curatorship. Clause 2 of the Bill aims to amend section 13 of the Prescription Act to make provision for those cases where victims of sexual offences are in a position to institute proceedings (for example, an adult), but then suffer relapses which prevent them from instituting proceedings for a period. Clause 2 aims to replace the term "*insane*" with

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Sexual offences epidemic: How is the law assisting?*...continued*

The result of this amendment is that there will no longer be a distinction between statutory and common law sexual offences for the purposes of prescription.

the phrase *"mental or intellectual disability, disorder or incapacity"*. In the *Levenstein* matter, the victims of the sexual assault alleged that they did not institute criminal proceedings against the perpetrator within the period prescribed by section 18 because of a lack of full appreciation of the nature and extent of the criminal acts allegedly perpetrated on them. This amendment therefore seeks to correct a situation where a sexual assault takes place when the victim is a child and the victim reaches majority but is still not in a position to institute their claim based on some kind of mental incapacity. It therefore broadens the basis on which prescription can be interrupted once the victim has become an adult.

- Section 18 of the Criminal Procedure Act regulates the prescription of the right to institute prosecutions after a period of 20 years has lapsed after the alleged commission of certain offences. A prosecution may, in terms of section 18, only be instituted after a period of 20 years has lapsed after the alleged commission of certain statutory sexual offences. Clause 3 of the Bill aims to amend section 18 of the Criminal Procedure Act to include reference to *all* sexual offences, whether they have been committed under common or statutory law. The result of this amendment is that there will no longer be a distinction between statutory and common law sexual offences for the purposes of prescription. This means an offender can be prosecuted for any sexual offence, statutory or not, no matter how much time has passed.

It is important to note that an amendment to the statutory provisions relating to the prescription of civil claims and criminal prosecutions arising out of sexual offences does not cure the disease of violence against women and children but rather treats its symptoms by ensuring that survivors have the opportunity to be appropriately compensated and that offenders can still be prosecuted despite lengthy lapses in time. It provides protection to children who have been victims of any sexual offence by allowing them to come forward many years after the offence took place. This Bill is a step in the right direction but is unfortunately reactive in nature. The time has come for South Africa to come up with proactive solutions and legislative frameworks which deal with the root cause of violence against women and children.

Roxanne Webster and Courtney Jones

Who is liable when a payment is made in terms of an invoice that has been intercepted and altered?

Subsequent investigations revealed that the email had been intercepted and the details on the invoice were changed.

Gone are the days of receiving physical invoices. Most, if not all, invoices are now sent electronically. While this may be faster and seemingly more secure, there are still some risks involved. What happens if either the creditor's or the debtor's email accounts are hacked? What if the banking details on the invoice are changed without either party's knowledge and payment is made? Who is liable in such a scenario?

This is exactly what happened in the case of *Galactic Auto (Pty) Ltd v Venter* (4052/2017) [2019] ZALMPPHC 27. The plaintiff, a motor vehicle dealership, Galactic Auto (Pty) Ltd (dealership) entered into a sale agreement with the defendant, Mr Venter (Venter), in respect of a motor vehicle. Venter required a motor vehicle on an urgent basis for his business. Venter received the invoice for the motor vehicle via email and subsequently paid the purchase price by way of EFT and sent the proof of payment via email to the dealership.

Venter then contacted the dealership advising that he had made the payment. The dealership, however, advised that they had not received the proof of payment. Venter then resent the proof of payment via email to the dealership. Having received the proof of payment, the dealership allowed Venter to collect the motor vehicle.

During the entire process, neither Venter nor the dealership confirmed that the banking details on the invoice were in fact correct and neither of them confirmed that the EFT was made into the correct bank account. Only once payment did not reflect in the dealership's bank account, a few days after Venter had already collected the motor vehicle did this fact come to light. Subsequent investigations revealed that the email had been intercepted and the details on the invoice were changed although it was not revealed as to how exactly the emails were intercepted. As a result, the dealership instituted legal proceedings against Venter for the purchase price of the motor vehicle.

The dealership argued that:

- there was no fault on the part of the dealership as they had conducted an investigation into their systems and found no security compromises;
- the invoice sent to Venter contained the correct banking details and was sent to Venter's correct email address; and
- the only reason Venter was allowed to collect the motor vehicle prior to payment reflecting in its bank account was due to the fact that it had previously dealt with Venter without any issues and as such had acted out of goodwill.

Venter raised the defence of estoppel alleging that:

- the dealership's standard protocol was to only release the motor vehicle to the purchaser upon receipt of the purchase price;
- one of the dealership's employees was meant to look over the proof of payment to ensure that the payment was made to the correct banking details; and
- the dealership was under the impression that the payment was successful and made into the right bank account. In addition, Venter counterclaimed for the balance of the purchase price stating that he was unable to recover the full amount paid into the incorrect bank account as he was not timeously notified by the dealership that the payment was made in error.

Who is liable when a payment is made in terms of an invoice that has been intercepted and altered?

...continued

The court will not come to the aid of those that it deems to be negligent and it is therefore even more important to have a system of checks and balances when dealing with these methods of payment.

The first issue the court dealt with was the differing versions put forward by the two parties. In order to determine which version was more probable, the court weighed up the evidence submitted by both parties. The court found that Venter's witnesses were not as reliable as the dealership's and that Venter's version had inconsistencies. Accordingly, the court was inclined to favour the version put forward by the dealership.

The second issue the court dealt with was whether Venter could raise the defence of estoppel or not. In this regard, Venter bore the onus of proving the defence of estoppel and had to show that he had made the payment into the bank account of the dealership. The court referred to the version submitted by Venter and its inconsistencies as it pointed out that during cross examination, Venter admitted that there was no attributable fault to the dealership's sales representative when Venter made the payment into the wrong bank account. Therefore, the court found that there was no misrepresentation made by the dealership – a requirement for a defence of estoppel to succeed.

Lastly the court had to decide the merits of Venter's counterclaim. The court again had regard to the evidence presented by each party as well as the inconsistencies in Venter's version. The court pointed out that if Venter had merely verified the banking details before making the payment, then such a loss would have been prevented.

The court ultimately decided that Venter was liable and that his defence and counterclaim both failed. The court further stated that Venter, as the debtor, bore the liability and risk in the situation where invoices were intercepted and fraudulently altered.

Our courts will treat such instances in the same vein as a cheque that has been intercepted and misappropriated by a thief stating that:

> *"When a debtor tenders payment by cheque, and the creditor accepts it, the payment remains conditional and is only finalised once the cheque is honoured.... that risk is the debtor's since it is the debtor's duty to seek out his creditor."*

As the use of electronic methods of invoicing and payments increase, it is clear as to why this case should be a clear warning for all. The court will not come to the aid of those that it deems to be negligent and it is therefore even more important to have a system of checks and balances when dealing with these methods of payment. Without these precautions, it is likely that by the time you realise that the invoice has been compromised, the money would have already disappeared.

Roxanne Webster and Merrick Steenkamp

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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